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March 25, 2009

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Re: Legal Issues Raised by the Draft Cleanup and Abatement Order for the Rubicon Trail, El Dorado County

Dear Mr. Pulupa:

There are a number of legal issues concerning the Rubicon Trail that are implicated by the Regional Board's draft cleanup and abatement order that I would like to discuss with you. Any order that might eventually be issued by the Regional Board would have to consider the legal issues that are unique to the Rubicon Trail, which this memorandum explores.

Many members of the public entertain misperceptions concerning the ability of El Dorado County to take actions affecting the use of the Trail. My belief is that these misperceptions were contributed to by the draft trail master plan and draft EIR that were produced by a county consultant in 2006 and 2007. In the more typical case, a proposed plan (i.e., a "project description") is initiated by a governing body, and an environmental analysis is then undertaken on that proposed plan. As part of the environmental review, alternatives to the proposed plan are conceived and analyzed. The proposed plan plus the environmental analysis including alternatives then returns to the legislative body so that a final action can be taken. In the case of the Rubicon Trail, however, the county did not initially select a proposed plan for study but instead asked the consultant to speak with members of each of the affected communities of interest and gather ideas for things that might be included in a plan. At the same time the consultant was asked to perform an environmental analysis of the items suggested to him. In other words, the consultant was asked to develop a "project description" and perform an environmental analysis of the various proposals in that description simultaneously. Members of the public mistakenly came to believe that the consultant's plan was somehow endorsed by the county. This is not the case.

The consultant's plan was simply a collection of suggestions made by others, plus an analysis of the environmental pros and cons of those suggestions. The idea was that the consultant's plan plus environmental information would eventually be considered by the Board of Supervisors, at which time the Board of Supervisors would decide which of the suggested plan elements the Board might wish to include in a county plan. Unfortunately, after the consultant delivered the draft plan and EIR, the county found itself in the midst of the most drastic fiscal crisis in county history, and had to eliminate functions and positions from all county departments including the county departments of general services, parks and recreation and transportation, each of which was involved in the Rubicon Trail. When these budgets came under review as part of the weeks-long budget process, one of the many important functions that had to be cut for fiscal reasons was further action on the Rubicon Trail plan. The decision wasn't to terminate all action, but to pause until the county had the money and resources to resume the process of developing a plan. Since most people were not following the many intricate details of the long and dreary budget-cutting process, they did not realize that this action had been taken, or the reasons for it. Thus a mistaken impression arose that the county had somehow adopted the consultant's master plan, but then failed to follow it.

The reason I have explained this process at such length is that contained in the consultant's draft plan are certain elements such as a seasonal closure, a numerical limitation on the number of users, a permit system, etc. This has lead people to assume that these things must be legally possible or they never would have been included in the county's master plan. In reality, the consultant accumulated suggested plan elements from all sources and did not vet them for legality. Any proposed elements that turned out to not be legally possible would have been weeded out had the process continued as originally conceived. It appears that the Regional Board drafted its draft cleanup and abatement order under the assumptions that the consultant's draft master plan had somehow been endorsed or adopted by the county, and that the elements of that plan must therefore have been determined to be legally possible. These unstated assumptions need to be analyzed carefully because the reality is that some of the methods in the consultant's draft plan for controlling the use of the Rubicon Trail are simply not legally available to the county.

The Rubicon Trail exists as a public right of way under a somewhat obscure federal law called R.S. 2477. I have explained below my understanding of some of the features of that law. My understanding of California law concerning the ability of the county to control a public right of way, as distinguished from a "county highway" that has been formally accepted into the county maintained road system, is also set forth below. This is the legal landscape in which the county, and the Regional Board, must operate. I trust that by working together we will be able to achieve a mutual understanding of the legal limits on both entities.

Description of Road

What is now generally referred to as the Rubicon Trail is a portion of a road that in El Dorado County is called Wentworth Springs Road. Wentworth Springs Road is a historic road dating from gold rush days which goes between Georgetown in El Dorado County over the

Sierra crest (at an elevation just over 7,000 feet) to Tahoma at Lake Tahoe in Placer County, where it is known as the McKinney-Rubicon Springs Road. This memorandum concerns only the portion in El Dorado County.

Wentworth Springs Road proceeds generally easterly from Georgetown until it intersects with Ice House Road. The combined road goes north about a mile until it separates. After its separation from Wentworth Springs Road, Ice House Road proceeds generally northeast to Loon Lake, then proceeds along the north shore of Loon Lake past the North Shore RV campground until it ends at the dam on the north side of Loon Lake where the lake spills into Gerle Creek. Ice House Road is on an easement that was deeded to and is owned by the county, and is a county maintained road, paved all the way to its end at the north dam on Loon Lake, where a segment of the Rubicon Trail called the Ellis Creek Intertie begins.

After its separation from Ice House Road, Wentworth Springs Road proceeds north to the Airport Flat Campground. At Airport Flat Campground, the road splits into a dirt road (Wentworth Springs Road) and a paved Forest Service Road (USFS Road 14N07). After the split, Wentworth Springs Road proceeds generally north, around an unnamed hill to its west, crossing Gerle Creek. After the split, Forest Service Road 14N07, which is paved, also proceeds north roughly parallel to Wentworth Springs Road but keeps the unnamed hill to its east. These two segments meet again north of the unnamed hill, and from there Wentworth Springs Road goes generally east past the Wentworth Springs Campground. Wentworth Springs Road up to the Wentworth Springs Campground has been formally accepted into the county maintained road system and therefore qualifies as a "county highway." After passing the Wentworth Springs Campground, Wentworth Springs Road proceeds generally easterly to where it joins a road called the Ellis Creek Intertie just before the combined road crosses Ellis Creek. Wentworth Springs Road continues in a generally easterly direction past Little Sluice Box, Spider Lake, Buck Island Lake, Rubicon Springs, and to the county line between El Dorado and Placer counties. Across the county line in Placer County, the road is known as the McKinney-Rubicon Springs Road, which proceeds easterly to Lake Tahoe at Tahoma where it intersects with State Highway 89 close to the lakeshore.

For the purpose of this legal analysis, the Rubicon Trail in El Dorado County should be thought of as having three segments.

1. Wentworth Springs Road from the Airport Flat Campground to the Wentworth Springs Campground (approximately 6 miles) is unpaved and is passable only by 4 wheel drive vehicles with experienced drivers. The public right of way crosses over both federally-owned land which is a part of the Eldorado National Forest, and over privately-owned lands which were patented from the federal government to private owners. The public right of way over both federal and private land has been established under a federal law called R.S. 2477. The county does not own any land, easement or other property interest in this segment. This segment has been formally accepted into the county maintained road system, and therefore qualifies as a "county highway" under Streets and Highway Code §900 *et seq.*

2. Wentworth Springs Road from the Wentworth Springs Campground to the boundary between El Dorado and Placer counties (approximately 12 miles), is unpaved The public right of way crosses over both federally-owned land which is a part of the Eldorado National Forest, and over privately-owned land which was patented from the federal government to private owners. The public right of way has been established under R.S. 2477. The county does not own any land, easements or other property interests in this segment. In distinction from segment 1 described above, this segment has not been formally accepted into the county maintained road system and so it is a "public road" but not a "county highway."

3. The road commonly known as the Ellis Creek Intertie starts where Ice House Road ends at the trailhead on the north shore of Loon Lake, at the north dam where the lake spills into Gerle Creek, and proceeds generally northeasterly to where it joins Wentworth Springs Road at about Ellis Creek (approximately 2 mile). It is unpaved. It became popular as an easier access to the Rubicon Trail after the hydroelectric project at Loon Lake was completed in the 1960s, because off-road enthusiasts could drive on paved Ice House Road to the beginning of the Ellis Creek Intertie and thus obtain access the attractive part of the Rubicon Trail much quicker than driving the longer way around on the portions of Wentworth Springs Road described above in segments 1 and 2. The land underlying the Ellis Creek Intertie is owned by either the United States as part of the Eldorado National Forest, or by private parties who originally obtained title from the U.S. by way of a federal patent. There is evidence that this area was used for travel by the public during the early part of the 1800s, so it is likely that a public right of way was obtained by operation of R.S. 2477 and common law dedication. However, it has not been necessary to resolve this issue because both the U.S. Forest Service and the private landowners have conveyed deeded easements for the roadway to the County, subject to the terms and conditions expressed in those deeds. Thus the County has an easement interest in the land underlying the Ellis Creek Intertie, but it has not been accepted into the county maintained road system so it is a "public road" but does not qualify as a "county highway."

Right of Way Under Federal Law-- RS 2477

The public acquired the right to use Wentworth Springs Road under a federal statute commonly known as Revised Statute (R.S.) 2477. R.S. 2477 was enacted in 1866 during the early history of California. Upon the cessation of California by Mexico, title to all lands not vested in individuals passed to the United States pursuant to the Treaty of Guadelupe Hidalgo. Upon statehood, the U.S. retained its proprietary interest in public lands. At that time, the U.S. had a policy of reserving land and not opening it up to free exploration, but that changed in the mid to late 1800s when national land policy shifted to one of opening up federal land to speed economic development and settlement, primarily in the western states, and a number of federal land grant and right of way laws were enacted. One of these laws was enacted on July 26, 1866, printed at volume 14 of the Statutes at Large, pages 251 – 253 (cited as 90 Stat. 251), entitled "An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes." Section 8 of that act provides, in total: "And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The federal act of July 26, 1866 has been called by many names over the years. In

1932 the U.S. Supreme Court called it the "Act of July 26, 1866." It has also been called the "Mining Act of 1866." The Act of July 26, 1866 was codified in 1873 as "Revised Statutes 2477," and today R.S. 2477 is probably the most common name used for the law, and is the name that will be used in this memorandum. The Act of July 26, 1866 was re-codified in 1938 as 43 U.S. Code §932, and it is often cited this way in legal opinions.

R.S. 2477 establishes rights of way for roads used before its passage in 1866, *Central Pacific Railway Co. v. Alameda County* (1932) 284 U.S. 463, and also "operated prospectively to grant rights of way for highways constructed after its enactment," *U.S. v. Gates of the Mountains Lakeshore Homes*, 732 F. 2d 1411 (9th Cir. 1984).

R.S. 2477 remained in effect for 110 years until it was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub.L. 94-579, 90 Stat. 2743, 43 U.S. C. §1701 *et seq*. When Congress repealed R.S. 2477, it specified that any valid R.S. 2477 right of way existing on the date of approval of the new FLPMA would continue in effect. This "savings clause" was passed as §701 of the FLPMA, 90 Stat. 2786, and was not codified but appears in the history note following 43 U.S.C. §1701. It states: "Nothing in this Act or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." This had the effect of "grandfathering" R.S. 2477 rights of way that had been established up to October 21, 1976, and preventing new R.S. 2477 rights from being created after that date.

R.S. 2477 created thousands of miles of public roadways across federal land during its 110 year existence. The existence, nature and extent of those thousands of miles of public roadway have generated many disputes. One of the reasons for the unusual level of controversy was that establishment of a road under R.S. 2477 required no formal action of the federal government, the public or any local jurisdiction, so rights of way sprang into existence without any formalities, leaving none of the records most people are used to when important property rights are established. It has been said that "[a] major difficulty is the 1866 act had no recordation requirements and the federal government never imposed one." *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal. App. 4th 278, 296. Another court has described the situation this way:

> Unlike any other federal statute of which we are aware, the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of acceptance on the part of the states or localities in whom the right was vested. . . . R.S. 2477 was a standing offer of a free right of way over the public domain, and the grant may be accepted without formal action by public authorities. . . . R.S. 2477, unlike most federal land law, does not provide for a patent and does not provide for any administrative process for perfecting a claim.

Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F. 3d 735, 741, 752 fn. 6 (10th Cir. 2005) (internal quotations omitted). From time to time, federal land agencies have

attempted to impose rules on how R.S. 2477 rights might be established or proven or recorded, but these have never been successful. In 1996 Congress essentially stopped any efforts by federal land management agencies from passing regulations pertaining to the recognition, management, or validity of R.S. 2477 rights of way. Pub. L. No. 104-208, 110 Stat. 3009 (1996) ("No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996].").

There is a great deal of interplay between federal and state law in R.S. 2477 claims. The consensus of published court cases is that Congress intended to leave the details of the implementation of R.S. 2477 up to the law of the state in which the right of way appears. R.S. 2477 is generally viewed by courts as an express offer by the federal government to dedicate a right of way over federal land. While federal law governs the interpretation of R.S. 2477, in determining what is required to constitute acceptance of the offer to dedicate, federal law could "borrow" from long established principles of state law concerning acceptance. *Standage Ventures, Inc. v. State of Arizona*, 499 F. 2d 248 (9th Cir. 1974) ("All parties agreed that 43 U.S.C. § 932 was self-executing, and that a right-of-way came into existence automatically when a public highway was established across public lands in accordance with the law of the state."); *U.S. v. Gates of the Mountains Lakeshore Homes*, 732 F. 2d 1411 (9th Cir. 1984) (Discussing R.S. 2477, and holding that the scope of a federal land grant is a question of federal law, but may be influenced by state rules.); *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F. 3d 735 (10th Cir. 2005) (Citing the California Supreme Court opinion in *Ball v. Stephens* (1945) 68 Cal. App. 2d 843, for the proposition that an R.S. 2477 right of way could be established through irregular usage by a limited number of people for things like hunting, vacationing, etc., because that method of acceptance was recognized by state law.). California courts have interpreted R.S. 2477 to be in the nature of an express offer of dedication, which under California law could be accepted either by the formal action of the appropriate public entity, or merely by public use of the road. *McRose v. Bottyer* (1889) 81 Cal. 122, 126; *Ball v. Stephens* (1945) 68 Cal. App. 2d 843. The length of time of public use is not important, and the rights of the public can immediately vest. *Schwerdtle v. Placer County* (1895) 108 Cal. 589, 593. In *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal. App. 4th 278, 304, the court held that the enactment of R.S. 2477 in July 1866 constituted the federal government's offer to dedicate roadways, which offer "was accepted when the next stagecoach passed over the road." Applying these authorities to the Rubicon Trail, the indisputable conclusion is that the public right of way over Wentworth Springs Road was established by federal law the very next time a wagon passed over it after the enaction of R.S. 2477 on July 26, 1866. The later formal actions by the El Dorado County board of supervisors in 1887 and in 1989, declaring that Wentworth Springs Road was a "public highway," simply memorialized this status which had been achieved earlier by the self-executing operation of federal law.

In addition to acceptance, courts have also consulted state law to determine the scope of an R.S. 2477 right of way. *U.S. v. Gates of the Mountains Lakeshore Homes*, 732 F.2d 14111413 (9th Cir. 1984) ("The scope of a grant of federal land is, of course, a question of

federal law . . . [b]ut, in some instances it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances." (citations and internal quotations omitted)); *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988).

There is essentially no reported case law discussing how R.S. 2477 rights might be vacated or abandoned, nor who can abandon that right of way, the public or a public entity or an individual user. If California law were to apply to the question of vacation of the public right of way established under R.S. 2477, as it has been applied to issues of acceptance and scope, then the public's right to use the Wentworth Springs Road will continue "until it is clearly and unmistakably abandoned." *Schwerdtle v. Placer County* (1895) 108 Cal. 589, 594. "Once a highway, always a highway." *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal. App. 4th 278, 304. A public road cannot be abandoned by nonuse. *Humboldt County v. Van Duzer* (1920) 48 Cal. App. 640. Under California law, a public road can only be vacated by formal action of the appropriate public entity, and then only for certain specific reasons, as discussed below.

If the historic route of Wentworth Springs Road passed over any parcels that had been patented to private parties before enactment by Congress of R.S. 2477 in July, 1866, the owner's acquiescence in the public use of the road created a public right of way by implied dedication under state law. *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal. App. 4th 278, 293 ("The owners of parcels privately owned before 1866 impliedly dedicated those portions to public use."). Any parcels that were patented after the enactment of R.S. 2477 in July, 1866 were transferred to private owners subject to any interests that the U.S. had already conveyed, including any R.S. 2477 roads, whether the right of way was recorded or not. *McRose v. Bottyer* (1889) 81 Cal. 122, 126; *Bequette v. Patterson* (1894) 104 Cal. 282; *Schwerdtle v. Placer County* (1895) 108 Cal. 589; *Ball v. Stephens* (1945) 68 Cal. App. 2d 843; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal. App. 4th 278, 296. In *Town of Red Bluff v. Walbridge* (1911) 15 Cal. App. 770, it was held that a federal patent dated September 20, 1866, conveyed title to private owners subject to the public right of way established under R.S. 2477 which had been enacted by Congress less than 60 days before on July 26, 1866.

The precise location of R.S. 2477 rights of way has occasionally generated controversy. Courts generally hold that the location of an R.S. 2477 right of way is determined by the historical use. In some instances, the historical use varied depending on certain conditions such as snow, flooding, rock falls, etc., and these instances give rise to a variable right of way. In *Central Pacific Railway Co. v. Alameda County* (1932) 284 U.S. 463, the U.S. Supreme Court confirmed the continued existence of a roadway established under R.S. 2477 even though it had moved across a narrow canyon as the result of a flood, saying:

> The original road was formed by the passage of wagons, etc., over the natural soil, and we know, as a matter of ordinary observation, that in such cases the line of travel is subject to occasional deviations owing to changes brought about by storms, temporary obstructions, and other causes. But, so far as the specific

> parcels of land here in dispute are concerned, we find nothing in the record to compel the conclusion that any departure from the line of the original highway was of such extent as to destroy the identity of the road as originally laid out and used.

The Supreme Court's holding was that the relocation of an R.S. 2477 roadway because of a flood was not an abandonment of the old roadway, and the new roadway remained authorized under R.S. 2477 and did not require a new, independent basis for its existence. The concept of a variable right of way has been endorsed by other courts. *See, e.g., Wilkenson v. Dept. of Interior*, 634 F. Supp. 1265, in which the court said: "[i]t has long been the law that the course of a right of way may be altered without destruction of the right of way . . . by mutual consent . . . by acquiescence, or it may be the result of changes resultant from natural causes," citing *Central Pacific Railway. Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal. App. 4th 278, 307-309 held that the public right of way under R.S. 2477 is not lost just because the historical roadway has been substantially moved, based on the "commonsense idea" that the important points are a road's termini, and the intermediate route in between can change depending on circumstances. A leading case from the Tenth Circuit, *Sierra Club v. Hodel*, 848 F. 2d 1068 (10th Cir. 1988), also held that deviations from an established roadway in response to flooding or rock slides can be accommodated under R.S. 2477. These legal principles are reflected in the Rubicon Trail, the course of which varies with the terrain and the weather, giving rise to the many bypasses that are used to avoid obstacles, and the alternate routes that are used depending on the capability of the vehicle. All of these are legitimate rights of way established by R.S. 2477.

Note that the Supreme Court in *Central Pacific* held that an R.S. 2477 right of way could be established by the passage of wagons. Despite the wording of R.S. 2477 that a right of way is for "the construction of highways," there does not need to be any actual mechanical construction to establish the right of way. Many cases in addition to *Central Pacific* hold that the passage of vehicles, which by their nature alter the ground upon which they travel, the so-called "beaten path," is sufficient to establish a right of way under R.S. 2477. *See, e.g., Wilkenson v. Dept. of Interior*, 634 F. Supp. 1265 (D. Colo. 1986). Under California law, no mechanical construction was required to accept an express dedication; all that was necessary to establish a public right of way was the passage of vehicles. *Ball v. Stephens* (1945) 68 Cal. App. 2d 843 (An R.S. 2477 road could be established "without the necessity of road construction" if "vehicles . . . were driven across it" irregularly by a limited number of hunters, vacationers, etc.).

The public's right to pass over federal land established under R.S. 2477 includes the public's right to maintain the road. In addition to the right of individual members of the public to maintain the right of way, the state or a local jurisdiction can maintain an R.S. 2477 right of way if permitted under state law. Substantial questions exist concerning what activities constitute maintenance, whether improvement is also allowed, what the difference between maintenance and improvement is, and whether any maintenance or improvement can be regulated by the federal government. A recent case purported to summarize the law by saying:

> [T]the scope of an R.S. 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute. That did not mean, however, that the road had to be maintained in precisely the same condition it was on October 21, 1976; rather, it could be improved as necessary to meet the exigencies of increased travel, so long as this was done in light of traditional uses to which the right-of-way was put as of repeal of the statue in 1976.

Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F. 3d 735, 746 (10th Cir. 2005) (internal quotations omitted).

Another recurring issue is whether the federal government can regulate the use, maintenance or improvement of R.S. 2477 rights of way over federal lands, and if so, what the extent of its regulatory power is. In *U.S. v. Vogler*, 859 F. 2d 638, 642 (9th Cir. 1988), *cert. denied,* 488 U.S. 1006 (1989), it was held that "the government is not without authority to regulate the manner of . . . use of the . . . trail," and that a National Park regulation requiring a permit for the operation of a heavy D-8 Cat could be enforced on an R.S. 2477 trail in Alaska because the operation of such a heavy piece of equipment was fundamentally different than the mere passage of normal vehicles. *Vogler* simply stated the general proposition and did not delve into what kinds of regulations could be enforced. Some have argued that the *Vogler* holding is limited only to the activities of private parties on R.S. 2477 roads and does not apply to a local public entity exercising its right to maintain an R.S. 2477 road. This issue was discussed by the District Court in *U.S. v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000), which held that the National Park Service could exercise its rights to protect the resources in Capitol Reef National Park, but it "may not preclude or unreasonably interfere with the reasonable exercise of the rights of those who hold valid rights of way within the boundaries of the park," and that no authorization from the federal agency was required as long as construction activity was within the historical right of way. *Id.* at 1241. The court noted on page 1238, fn. 58, that the fact that the "case law seems relatively scarce concerning improvement of R.S. §2477 roads by local governments suggests that, many times, such questions as have arisen between local and federal officials have been resolved through negotiation, mutual accommodation and agreement, rather than controversy and litigation." The Ninth Circuit referenced its *Vogler* decision in *Adams v. United States*, 3 F. 3d 1254, 1258 n. 1 (9th Cir. 1993) ("Even if the Adamses had an easement under R.S. 2477, they would still be subject to reasonable Forest Service regulations."), but this is once again a general statement of the proposition without elaboration. The Ninth Circuit also referenced *Vogler* in its 1994 decision in *Clouser v. Espy*, 42 F. 3d 1522 (9th Cir. 1994) holding that the U.S. Forest Service could regulate the use of R.S. 2477 roads in the John Day Wilderness Area in Oregon pursuant to its authority to regulate mining claims and to preserve wilderness areas.

Among the things that the federal government cannot do is require a permit or charge a fee for members of the public to use the public right of way established under R.S. 2477, except in unusual circumstances such as where a user proposes to bring in heavy equipment for major alteration of a roadway in a park or a wilderness. The Ninth Circuit in both *Vogler* and *Hicks* cited a District Court case from Colorado so holding. In *Wilkenson v. Dept. of Interior*, 634 F.

Supp. 1265 (D. Colo. 1986) the District Court held that the National Park Service could not require those persons using an R.S. 2477 right of way to pass through the Colorado National Monument to obtain a permit or pay an entrance fee to the Monument, saying: "[b]ecause this court holds that there is a continuing public right of way across the disputed roadways, the government's imposition of a fee for such use is an invalid restriction on that right of access." *Id.* at 1276. This holding was in accord with the U.S. Supreme Court's decision in *Colorado v. Toll*, 268 U.S. 228 (1925), in which the Court reinstated a case which sought to strike down the National Park Service's plan to "refuse permission to anyone operating automobiles for hire except one corporation which has received a permit" and to "exact a license fee from privately owned vehicles" in Rocky Mountain National Park, which would have infringed on pre-existing R.S. 2477 rights of way established before the national park was established, saying that the federal government was not warranted in extending such power.

In *Hale v. Norton*, 476 F. 3d 694 (9th Cir. 2007) the court held that the owner of an inholding in Alaska surrounded by National Park could be required to apply for a permit from the National Park Service before making his planned 16 trips with a large bulldozer in the summer to rebuild and reopen a long-abandoned trail. No permit was required to bring in heavy vehicles in the winter because in Alaska the potential for damage was far less after "freeze up" ("Winter use both protects the natural environment from damage and protects inholders from getting stuck in the mud."), and no permit was required of other normal motorized users who were not using heavy equipment. The rub was that the heavy equipment permit would require an environmental analysis under NEPA, with all of the attendant delay and expense. The landowner claimed that he held R.S. 2477 rights to use the road in any season and therefore he couldn't be required to get a permit even for heavy equipment. Assuming, without deciding, that the landowner had R.S. 2477 rights to use the trail, the court said those rights were subject to "reasonable regulation."

Under R.S. 2477, the public obtains a right of way over the underlying federal land, but does not acquire an actual property interest in the land. An R.S. 2477 right of way "is not tantamount to fee simple ownership of a defined parcel of territory. Rather it is an entitlement to use certain land in a particular way." *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F. 3d 735, 741, 747 (10th Cir. 2005). Because an R.S.2477 right of way does not create an actual property interest in federal land, cases attempting to establish R.S. 2477 rights under the federal Quiet Title Act are routinely dismissed because standing under that Act is only for those with property interests. *See, e.g., Hazel Green Ranch v. U.S. Department of the Interior*, 2008 U.S. Dist. LEXIS 87367 (E.D. Cal. 2008); *Friends of Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165 (E.D. Cal. 2007) (Private parties cannot sue federal government under the Quiet Title Act to establish R.S. 2477 rights as members of the public, because the right of members of the public to use an R.S. 2477 road is not a property interest under federal or California state law.); *Aleman v. U.S.*, 372 F. Supp. 1212 (D. Ore. 2005).

A recent and fairly comprehensive summary of the law concerning R.S. 2477 rights of way in California was given by the Third District Court of Appeal in *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal. App. 4th 278. This case arose when a private landowner

attempted to prevent members of the public from using an historic road called the Marysville-Nevada Road and the Hammonton Road which passed through a part of Yuba County known as the "goldfields." A public road was noted in public records beginning in the 1850s, in 1858 the Yuba County board of supervisors declared it "a public highway," and in 1877 the board ordered a gate erected by residents be removed. The Third District Court of Appeal extensively reviewed how roads in California were established under R.S. 2477, and concluded that the road in dispute was indeed a public road under that law. The court held that R.S. 2477 was an actual offer of dedication, "albeit an amorphous one because the specific lands are not stated." The court held that R. S. 2477 incorporated state law principles regarding acquisition of roads over public lands, recognized that no application for an R.S. 2477 right of way was required nor did any such road have to be recorded after it was established, said that this "made the creation of roads extremely easy in the West, and thousands of roads created under the 1866 act continue to exist," and noted that as a result, "widespread confusion ensued." *Id.* at 294. The R.S. 2477 right of way "arose spontaneously by the efforts of miners and others." Congress by enacting R.S. 2477 offered the right of way for dedication, "which was accepted when the next stagecoach passed over the road." *Id.* at 304.

The roads in *Western Aggregates* passed over federal land, but also over private land, some of which had been patented by the U.S. to private owners before R.S. 2477 came into existence in 1866. However, since public use of the roadway predated the patent, "the pre-1866 patentees took their property burdened by a public road and thereafter acquiesced in the continued use of the road," so the public had a right of way over the private parcels under the state law of implied dedication. For those patents issued after R.S. 2477 was enacted in 1866, "the grant was subject to any interests the United States had already conveyed, including any R.S. 2477 highways, recorded or not." *Id.* at 296. The actual location of the roadway varied considerably because of the actions of the parties involved in mining the goldfields, but the court held that the right to pass over the land continued wherever the roadway was at any given time.

> [T]he substitution of a new highway for an old, when accepted by the public has been held a dedication of the new highway. Where the termni remain the same, and a party over whose land a roadway changes voices no objection (or changes the route), the new route succeeds to the status of the old. . . . Cases construing R.S. 2477 have followed the common law rule regarding changes in the precise line of a road. . . . This reflects the commonsense idea that a road's importance may lie in the points it connects. The 'fair inference' is the road connects points, completing a throughway, even if the intermediate route changes.
>
> *Id.* at 308 - 309.

California Law of Public Roads

Under California law, the term "highway" or "public highway" comprehends the rights of all the individuals in the community to pass over a designated passageway, with the incidental right in the public to do all of the acts necessary to keep it in repair, and includes both graded and

ungraded, finished and unfinished, public thoroughfares in which the public has a right of way. *Smith v. City of San Luis Obispo* (1892) 95 Cal. 463; *Parsons v. City and County of San Francisco* (1863) 23 Cal. 462. Functionally "highways" and "streets" are synonymous since they are both open to the public for passage by vehicles; the principal distinction is that a public road in an incorporated city is often called a street whereas a public road in an unincorporated area is often called a road or a highway. *City of Santa Ana v. Santa Ana Valley Irr. Co.* (1912) 163 Cal. 211.

A public right of way acquired by dedication and acceptance under R.S. 2477 or other means is properly called a "public road." A public road however, does not become a "county highway" unless and until it has been accepted into the county maintained roadway system by formal action of the county board of supervisors. Streets & Highways Code §941(b) ("No public or private road shall become a county highway until and unless the board of supervisors, or its designee, by appropriate action, has caused the road to be accepted into the county road system."); §941(c) ("The acceptance of any road . . . does not constitute the acceptance of the road into the county road system in the absence of the adoption of a resolution by the board of supervisors accepting the road into the county road system."); §904 ("No route of travel used by one or more persons over another's land shall become a county highway by use."). The Attorney General has opined that "[n]o public or private road may become a county highway unless and until the board of supervisors or a designee specifically accepts it as such," citing Streets & Highway Code §941. 87 Ops. Cal. Atty. Gen. 36 (2004); 47 Ops. Cal. Atty. Gen. 191 (1966). The Attorney General has said:

> "[T]he right of the public to travel the road is unquestioned, having been established by adverse user. Such being the case it is a public road. There is a recognized distinction between public roads and county highways. A county highway is a road that has been adopted into the county road network pursuant to law, while a public road is one over which the public has acquired the right to travel, but which has not been incorporated into the county road system."

55 Ops. Cal. Atty. Gen. 81 (1955). The court in *Hays v. Vanek* (1989) 217 Cal. App. 3d 271, dealt with a situation in which a road was formally offered for dedication to the county, which the county rejected. Lot owners in the subdivision used the road to access their property and this was deemed to constitute "public acceptance" of the owner's dedication. The court held that the road was therefore a public road, but not a county highway, because there had been no formal acceptance of the road into the county maintained road system, saying at 283-284:

> The fact that an offer of dedication was rejected by the County because the Shady Brook road did not meet County standards does not necessarily mean that the road was not a "public" road. A relatively recent Attorney General's Opinion addressed the question whether a county could accept an offer of dedication without also accepting responsibility for maintenance of the road. Concluding this was indeed possible, the Attorney General emphasized the difference between "public" roads in general, and those particular public roads which are maintained by the county:

> "Although a road is a 'public street' and subject to 'public control,' it need not necessarily be maintained by the local governing entity. All roads over which the public has a right to travel, whether express or prescriptive, are 'public' roads. 'Public' roads, however, are not 'county' roads until accepted as such by appropriate resolution of the board of supervisors. (Sts. & Hy. Code, § 941; 45 Ops. Cal. Atty. Gen. 98, 100 (1965).)" (*County Responsibility for Public Roads*, 61 Ops.Cal.Atty.Gen. 466, 468 (1978).) Here, the fact that the County refused to accept Casa de Roca Way as a county road -- thus imposing responsibilities for maintenance on the County -- is not inconsistent with its status as a "public" road.

This same conclusion has been repeated in other cases. "Acceptance by user does not mean the road becomes a county highway. . . . All roads over which the public has right to travel, whether express or prescriptive, are 'public' roads. 'Public' roads, however, are not 'county' roads until accepted as such by appropriate resolution of the board of supervisors." *Hanshaw v. Long Valley Road Association* (2004) 116 Cal. App. 4th 471 at 479-480, quoting from two Attorney General's opinions, 61 Ops. Cal. Atty Gen. 466 (1978) and 45 Ops. Cal. Atty Gen. 98 (1965). "[A] 'public road' is not the same as a 'county road.'" *Hanshaw, supra* at 480. Note that the term "county road" crept into the *Hanshaw* opinion as a synonym for "county highway."

There are a number of legal consequences that flow from the fact that a road is a "public road" but is not a "county highway." A county has no maintenance obligation nor any liability for lack of maintenance unless and until the road is formally accepted into the county maintained road system. S&HC §941(b).

> "Although a road is a 'public street' and subject to 'public control,' it need not necessarily be maintained by the local governing entity. . . . The general rule is that a county may not use county road funds for maintaining 'public' roads other than 'county' roads. Accordingly, a county has no statutory duty to maintain public roads that have not been accepted into the county highway system by resolution of the board of supervisors. . . . [Acceptance] by the public does not cast any maintenance or liability burden on the county."

There is no question that Wentworth Springs Road has been a "public road" by operation of R.S. 2477 since 1866 when R.S. 2477 was adopted and the first wagon or horse traveled that route afterwards. Segment 1 described above (Airport Flat Campground to Wentworth Springs Campground) is a "county highway" because it has been formally accepted into the county maintained road system. Segment 2 (Wentworth Springs Road from the Wentworth Springs Campground to the county line) and segment 3 (the Ellis Creek Intertie), however, are not "county highways" because there has never been a formal resolution of the board of supervisors accepting them into the county maintained road system. As such, the county has no obligation to maintain these two segments.

Hanshaw, supra at 479-480. The statutory authority of a county board of supervisors over a "county highway" is conferred by Streets & Highways Code Division 2, §§900- 1756. Section 940 gives a county board of supervisors "general supervision, management and control of the county highways." Section 901 says that "no county highway shall be abandoned or cease to be a county highway except as provided in this section." The procedures in Streets & Highways Code §900 *et seq.* are applicable only to "county highways" which have been formally accepted into the county maintained road system, Streets & Highways Code §941, and a record of those roads accepted into the county maintained road system must be kept by the Road Commissioner, Streets & Highways Code §908. There is no similar grant of authority over public roads that may be within the boundary of the county but which have not been formally accepted into the county maintained road system.

County Authority to Control Traffic Over Public Roads

El Dorado County's ability to take any action on the Rubicon Trail must be analyzed against the backdrop of California law concerning a local government's limited ability to exercise control over the public's use of a public roadway. In California, the public has the fundamental and inalienable right to use public roads. The California Supreme Court has said: "The use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right, of which the public and individuals cannot rightfully be deprived . . . All persons have an equal right to use them for purposes of travel by proper means, and with due regard for the corresponding rights of others." *Rumford v. City of Berkeley* (1982) 31 Cal. 3d 545 (citations and emphasis omitted). There is a strong public policy to protect the public's interest in continued use of its streets, and the public has strong rights in continued use of existing public streets. *Citizens for Improved Sorrento Access v. City of San Diego* (2004) 118 Cal. App. 808, 816-817. All members of the public have an equal right to make use of public roads. *Id.*; *Western Union Tel.Co. v. Hopkins* (1911) 160 Cal. 106; *Burgesser v. Bulocks* (1923) 190 Cal. 673.

The state has plenary power to control public streets and highways. Local government may enact ordinances regulating public roads only if this specific power is expressly, not impliedly, delegated to it by the state legislature, and any such delegations are strictly construed. *Rumford, supra* at 550; *Citizens Against Gated Enclaves v. Whitley Heights Civic Assn.* (1994) 23 Cal. App. 4th 812, 820 ("Since the state ahs preempted the entire field of traffic control, any right of a local authority to interfere with the free flow of traffic . . . must be derived from an express delegation of authority from the Legislature.").

The state has expressly preempted the entire field of traffic control. Vehicle Code §21 ("Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the state and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered in this code unless expressly authorized herein."); *Pipoly v. Benson* (1942) 20 Cal. 2d 366. Accordingly, a city or county may regulate

roads and traffic only if such regulation is expressly authorized by state law. 81 Ops. Cal. Atty. Gen.252 (1998); 78 Ops. Cal. Atty. Gen.65 (1995); 75 Ops. Cal. Atty. Gen.80 (1992).[1]

The bulk of the delegated authority of local governments to regulate traffic within their jurisdictions appears in Vehicle Code §21100- 21117. The main statute in the Vehicle Code granting authority to local jurisdictions to regulate traffic is Vehicle Code §21101, which reads:

> Local authorities, for those highways under their jurisdiction, may adopt rules and regulations by ordinance or resolution on the following matters:
> **(a)** Closing any highway to vehicular traffic when, in the opinion of the legislative body having jurisdiction, the highway is either of the following:
> **(1)** No longer needed for vehicular traffic.
> **(2)** The closure is in the interests of public safety and all of the following conditions and requirements are met:
> **(A)** The street proposed for closure is located in a county with a population of 6,000,000 or more.
> **(B)** The street has an unsafe volume of traffic and a significant incidence of crime.
> **(C)** The affected local authority conducts a public hearing on the proposed street closure.
> **(D)** Notice of the hearing is provided to residents and owners of property adjacent to the street proposed for closure.
> **(E)** The local authority makes a finding that closure of the street likely would result in a reduced rate of crime.
> **(b)** Designating any highway as a through highway and requiring that all vehicles observe official traffic control devices before entering or crossing the highway or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to the intersection.
> **(c)** Prohibiting the use of particular highways by certain vehicles, except as otherwise provided by the Public Utilities Commission pursuant to Article 2 (commencing with Section 1031) of Chapter 5 of Part 1 of Division 1 of the Public Utilities Code.
> **(d)** Closing particular streets during regular school hours for the purpose of conducting automobile driver training programs in the secondary schools and colleges of this state.
> **(e)** Temporarily closing a portion of any street for celebrations, parades, local special events, and other purposes when, in the opinion of local authorities having jurisdiction or a public officer or employee that the local authority designates by resolution, the closing is necessary for the safety and protection of persons who are to use that portion of the street during the temporary closing.

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[1] The Attorney General in 59 Ops. Cal. Atty. Gen. 329 (1976) lists some of the local efforts at traffic control which have been found to be preempted up to that time, such as local vehicle license fees, pedestrian regulations, speed limits, etc.

> **(f)** Prohibiting entry to, or exit from, or both, from any street by means of islands, curbs, traffic barriers, or other roadway design features to implement the circulation element of a general plan adopted pursuant to Article 6 (commencing with Section 65350) of Chapter 3 of Division 1 of Title 7 of the Government Code. The rules and regulations authorized by this subdivision shall be consistent with the responsibility of local government to provide for the health and safety of its citizens.

Vacation of Public Right of Way

There are two statutes authorizing the vacation of public roads (Streets & Highways Code §8324(b) and Vehicle Code §21101(a)(1)), and one statute authorizing the short-term closure of a "county highway" (Streets & Highways Code §942.5). When the legislature has provided a method by which a county may abandon or vacate roads, that method is exclusive. *County of San Diego v. California Water & Tel. Co.* (1947) 30 Cal. 2d 817.

Under Streets & Highways Code §8324(b), a local agency can vacate a public road, completely or partially, after a noticed public hearing, for only one reason: if the legislative body finds that the road "is unnecessary for present or prospective public use." Streets & Highway Code §8324(b). Under Vehicle Code 21101(a)(1), a local authority may close a highway to vehicular traffic when it is "[n]o longer needed for vehicular traffic."[2] These standards in these two statutes, although phrased differently, are essentially the same. *Citizens for Improved Sorrento Access v. City of San Diego* (2004) 118 Cal. App. 4th 808 dealt with a road closure that was made in reference to both sections, and the court conflated the standards together by simply saying a road may be closed "upon a finding that the street is no longer necessary." *Id.* at 814. The court in *Heist v. County of Colusa* (1984) 163 Cal. App. 3d 841 engrafted the additional condition that any vacation must be in the public interest in order to avoid instances where the vacation was motivated by fraud or collusion with neighboring landowners.

A vacation under either of these statutes can be set aside if it appears that there was not substantial evidence that the road was unnecessary for present or prospective vehicular traffic. *People v. City of Los Angeles* (1923) 62 Cal. App. 781. In *Citizens Against Gated Enclaves v. Whitley Heights Civic Assn.* (1994) 23 Cal. App. 4th 812, the City of Los Angeles attempted to vacate a neighborhood's streets under a statute generally allowing a city to withdraw its property

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[2] There are a few other statutes authorizing the vacation of a public road under very specific circumstances not presented here. *See, e.g.*, Vehicle Code §§21101(a)(2)(closure in counties with a population of more than 6 million to reduce the crime rate), §21101(d) (closing particular streets during school hours for driver education training);§21101.4 (temporary closure of highway due to serious and continual criminal activity); and §21102 (closing a roadway through a school ground for safety reasons), and Streets & Highways Code §8330 *et seq.* (summary vacation of a roadway that has been superseded by relocation).

from public use, so the neighborhood association could then gate them. The city obviously avoided using Vehicle Code 21101(a) because the city attorney had advised the city that it would have trouble finding that there was no present or future public use for the streets. Since the statutory authority to vacate a public road, Vehicle Code §21101(a), required a finding that the streets were no longer needed for vehicular traffic, and the city could not make that finding because it was contrary to the actual situation, the court struck down the street closure, saying that the city could not simply "wave the magic wand and declare a public street not to be a public street." Id. at 821. In *City of Lafayette v. County of Contra Costa* (1979) 91 Cal. App. 3d 749, the court held that the legislature expressly authorized the vacation of a roadway in Vehicle Code §21101(a) only upon a determination that it is no longer needed for vehicular traffic. The court then stated that "the necessary corollary is a legislative determination that the road may *not* be closed *if needed* for vehicular traffic." *Id.* at 756. In *Ratchford v. County of Sonoma* (1972) 22 Cal. App. 3d 1056), the trial court had upheld a road vacation because it found there was "adequate, though controverted, evidence" that the road was unnecessary. The appellate court recognized the deference given to legislative determinations like these, and noted that they were usually considered conclusive, but also noted that a judicial examination of the evidence was required or else "nothing would prevent the city council of Los Angeles from effectively closing Broadway in its entire length, nor a similar body in the city of New York from closing Wall Street," quoting from *People v. City of Los Angeles, supra.* Upon that examination, the appellate court found that although there was sufficient evidence that the roadway was not needed for present use, there was insufficient evidence about the need for prospective use, and reversed the city's vacation.

The legal conclusions that follow from the above authorities are that since a statutory vacation can only be done on the finding that the road is not needed for vehicular use, a vacation in the face of evidence that the road is in fact needed could be set aside as arbitrary, capricious and not in accordance with law. Furthermore, since the vacation of a roadway is considered to be a legislative act, the county cannot be ordered to vacate a road.

A consequence of the fact that vacating a public road is considered to be a legislative act is that the body with the authority to vacate cannot be directed in advance to take any particular action. In *Bowles v. Antonetti* (1966) 241 Cal. App. 2d 283, it was held that a court could not order a city council to annul its resolution of vacation because that would be an order to perform a specific legislative act. It stands to reason that the converse would also be true: it would not be possible to order a legislative body to take the specific act of vacating a public road.

Road Closure

The formal authority conferred on the county to "restrict the use of or close" a "county highway" is found in Streets & Highways Code §942.5, which states:

> The board of supervisors may restrict the use of, or close, any county highway whenever the board considers such closing or restriction of use necessary:
> **(a)** For the protection of the public.

> **(b)** For the protection of such county highway from damage during storms.
> **(c)** During construction, improvement or maintenance operations thereon.
> No liability shall attach to the county, or to the board of supervisors, for the restriction of use, or closing, of any county highway for the above public purposes.
> This section does not constitute a change in, but is declaratory of, the pre-existing law.

This statute would be applicable only to that portion of Wentworth Springs Road that has been formally accepted into the county maintained road system, which is the portion from the Airport Flat Campground to the Wentworth Springs Campground, segment 1 described above. There are only two reported cases citing Streets & Highways Code §942.5. In *Acosta v. County of Los Angeles* (1961) 56 Cal. 2d 208, the Supreme Court "conceded" without discussion that the County of Los Angeles could prohibit bicycle riding on sidewalk as a reasonable exercise of the power granted in Streets & Highways Code §942.5 to protect the public. *Acosta* was basically a tort case which focused on the liability of the city to a minor bicyclist "injured in a fall from his bicycle caused by a bump in a sidewalk negligently maintained by the county." The court held that the violation by the minor of the bicycle closure ordinance did not eliminate the county's obligation to maintain the sidewalk free of dangerous defects. The court could have reached this same conclusion even if there was no statutory authority to close the road to bicycles, so the court's reference to §942.5 is not essential to the opinion and therefore the case is somewhat dubious authority for the extent of the county's power under §942.5. In *People v. Sweetser* (1977) 72 Cal. App. 3d 278, the court reversed a trespass conviction of a kayaker accessing a river along a county right of way over a rancher's land, citing Streets & Highways Code §942.5 in passing for the proposition that a county may impose reasonable restrictions on the public's use of a highway, which is not really what §942.5 says.

The Attorney General in 78 Ops. Cal. Atty. Gen. 65 (1995) discussed the relation between Streets & Highways Code §942.5, which authorizes the closing or restriction of a county highway for the protection of the public, and Vehicle Code §21101.4, which authorizes a local authority to temporarily gate a road if pedestrian traffic on it causes serious and continual criminal activity. Noting that Streets & Highways Code §900 subjects the authority given in §§900-1756 to the limitations prescribed by other provisions of law, and that Vehicle Code §21 establishes that no local authority can enact any ordinance on the matters covered in the vehicle code unless that action is specifically authorized in the Vehicle Code, the A.G. concluded that "[a] county may thus act under the authority granted in Streets and Highways Code sections 900-1756 . . . however, such actions may be undertaken only in accordance with 'limitations and restrictions . . . prescribed by . . . other provisions of law,' including for example [Vehicle Code] section 21101.4." The conclusion by the Attorney General that the gating provisions of the Streets & Highways Code are subordinate to those in the Vehicle Code, raises the question of whether the authority in Streets & Highways Code §942.5 to close a county highway is subordinate to Vehicle Code §21101(a) that a highway can be closed only if it is no longer needed for vehicular traffic.

If Streets & Highway Code §942.5 is not pre-empted by the Vehicle Code, then on the one segment of the Rubicon Trail that is a "county highway" because it has been formally accepted into the county maintained road system (Airport Flat Campground to Wentworth Springs Campground), it is possible that closures or restrictions on use for the protection of the public, or protection of the highway from damage during storms, or during construction operations, would be authorized under state law.

Gates or Other Temporary Closures

Under California law, there is no general legal authority for a local government to partially close or gate a public road. *Rumford v. City of Berkeley* (1982) 31 Cal. 3d 545; *Citizens Against Gated Enclaves v. Whitley Heights Civic Assn.* (1994) 23 Cal. App. 4th 812. The state preempts traffic control over all roads including those under the jurisdiction of local authorities. Vehicle Code §21; *Pipoly v. Benson* (1942) 20 Cal. 2d 366. A local authority's ability to gate or partially close a road must therefore be expressly granted by statute, and any such a statute is strictly and narrowly construed. *Rumford, supra*; *Citizens Against Gated Enclaves, supra.* The seminal case in this area is *City of Lafayette v. County of Contra Costa* (1979) 91 Cal. App. 3d 749, in which the court struck down a city's plan to partially close a public road with an "automatic gate." Only those with "an established need" to use the road would be furnished devices to open the gate. The court held "at least in the absence of legislative authority to the contrary, that a city may not restrict the right to travel upon one of its streets to its residents or to other 'exempted drivers.'" *Id.* at 754. The court searched for any legislative authority that would allow a local agency to limit the users on a public road, and said that the only conceivable statute was Vehicle Code §21101(a) which permits a public authority to close a road if it is "no longer needed for vehicular traffic." However, the court held the "necessary corollary" of this section is that a road "may not be closed if needed for vehicular traffic." *Id.* at 756 (emphasis in original). The court specifically rejected as "contrary to law" the argument that if the statute allowed complete closure then it could be implied that it also allowed partial closure.

After *Lafayette* the legislature adopted Vehicle Code 21101.6, which says that notwithstanding Vehicle Code §21101, "local authorities may not place gates or other selective devices on any street which deny or restrict the access of certain members of the public to the street, while permitting others unrestricted access to the street." Section 21101.6 further states that it is not intended to change existing law but rather was intended to codify the decision in *Lafayette*. Later cases have clarified that *Lafayette* held the gates unlawful not just because they discriminated between classes of users, but because there was no statutory authority for partial closure of a public road. R*umford v. City of Berkeley* (1982) 31 Cal. 3d 545; *Citizens Against Gated Enclaves v. Whitley Heights Civic Assn.* (1994) 23 Cal. App. 4th 812.

The holding in Lafayette was endorsed by the Supreme Court a few years later in *Rumford v. City of Berkeley* (1982) 31 Cal. 3d 545. There the court determined that the City of Berkeley could not "divert traffic by erecting barriers" on city streets since this was not authorized under the city's authority to close city streets under Vehicle Code §21101. The Supreme Court agreed with *Lafayette* that the authority under Vehicle Code §21101 to close a

road was not authority to partially close them with barriers that would let some users through. "[L]ocalities have no carte blanche, and, absent express authority, may not determine which traffic shall and which shall not use streets." *Id.* at 77. The Court also held that the traffic barriers were not justified under the statutory delegation to local authorities to regulate traffic in their jurisdictions.

The statement by the courts in both *Rumford* and *City of Lafayette* that a local authority had to power to close a road equally to all traffic or to none, *Rumford, supra* at 554-558; *Lafayette, supra* at 756-757, means that a quota system or a permit system cannot lawfully be imposed on a public road in California. The Attorney General has agreed with this conclusion several times. 73 Ops. Cal. Atty Gen. 13 (1990) (*Rumford* and *Lafayette* each held that under Vehicle Code §21101(a), a local authority "would have to close the street equally to all traffic or none."); 68 Ops. Cal. Atty. Gen. 101 (1985) (City could not pass an ordinance authorizing "controlled access" to public streets through use of a card key gate or other devices). It's not just that the Vehicle Code does not allow gates, permits or quotas, the public's right to free and unobstructed passage to public roads is so fundamental, the Attorney General concluded in 68 Ops. Cal. Atty. Gen. 101 (1985) that the Legislature could not constitutionally adopt a statute that allowed restricted access.

Courts have consistently followed *Lafayette* and *Rumford.* An attempt to use a barrier to block off one lane of a road, and justify the barrier as a "traffic control device" authorized by Vehicle Code §21400, or as a device to prohibit entry to a street under §21101(f), was struck down in *Uhler v. City of Encinitas* (1991) 227 Cal. App. 795. An attempt to "withdraw" the streets in a residential area in Los Angeles and allow the residents inside the enclave to install gates to keep the public out was struck down in *Citizens Against Gated Enclaves v. Whitley Heights Civic Association* (1994) 23 Cal. App. 4th 812. Because the city had not followed the formal procedures to vacate the roads under Vehicle Code §21101(a), the city could not allow a "partial closure" by way of gates.

It is clear from the above discussion that the ability to vacate a road completely under Vehicle Code §21101(a) or Streets & Highways Code §8324(b) does not authorize partial closure through the use of gates. *Lafayette, Rumford* and *Citizens Against Gated Enclaves* all dealt with Vehicle Code §21101, and did not deal with Streets & Highways Code §942.5 which allows a board of supervisors to "restrict the use of, or close" a "county highway" for three specified reasons. The Attorney General in 78 Ops. Cal. Atty. Gen. 65 (1995) determined that Streets & Highway Code §942.5 was superseded by Vehicle Code §21101.4 in regard to installing a gate to control crime. There is a substantial legal issue whether Streets & Highways Code §942.5 is superseded by Vehicle Code §21101 in regard to any other type of closure. One possibility is that Streets & Highways Code §942.5 would not be held to be pre-empted by the Vehicle Code if it is interpreted to only apply to short-term emergency closures for the three reasons specified in the statute (protection of the public, protection of the highway from damage during storms, or during construction or maintenance operations). At most, since Streets & Highways §942.5 applies only to a "county highway," which is defined as one which has been formally accepted into the county maintained highway system, it would only apply to that

segment of Wentworth Springs Road that has been accepted into the County maintained highway system (Airport Flat Campground to Wentworth Springs Campground, described above as segment 1).

Applying the principles that a local authority's ability to regulate the use of a public road must be clearly expressed in a statute, and that any such authority must be construed narrowly, and coupling this with the holdings in *Lafayette* and *Rumford* that the public's use of a public road cannot be restricted by means less than complete closure, such as a gate (struck down in *Lafayette*) or a traffic barrier (struck down in *Rumford*), the inescapable conclusion is that public roads cannot be restricted by a gate or by other measures such as a permit, a fee, a quota, or a seasonal closure, unless such authority is clearly expressed in a statute. There are no statutes allowing a local authority to require a permit, a fee, quota or a seasonal closure, with the exception that the board of supervisors would be able to temporarily close or restrict a "county highway" for the protection of the public or the highway under Streets & Highways Code §942.5.

Fee for Use

As described above, the federal law is that a fee cannot be charged for the public's use of an R.S. 2477 right of way. *Wilkenson v. Dept. of Interior*, 634 F. Supp. 1265 (D. Colo. 1986), cited in *U.S. v. Vogler*, 859 F. 2d 638, 642 (9th Cir. 1988), *cert. denied,* 488 U.S. 1006 (1989). The same is true under California law. A toll for the use of a public road can only be imposed pursuant to express legislative authority. *Truckee & Tahoe Turnpike Road Co. v. Campbell* (1872) 44 Cal. 89; *Volcano Canyon Road Co. v. Board of Supervisors of Placer County* (1891) 88 Cal. 634. County boards of supervisors are expressly forbidden to grant franchises or licenses for the taking of tolls for roads. Streets & Highways Code §30810. In 59 Ops. Cal. Atty. Gen. 329 (1976) the Attorney General concluded that the city of Pebble Beach could not acquire private roads that were restricted by access gates and a requirement that nonresidents pay a fee prior to admission and continue to operate them in the same way. The Attorney General noted that while the "fee is characterized as an 'entry fee' rather than a toll, the actual effect of the proposal would be to transfer what we have previously described as a system of privately operated toll roads into a system of city owned and operated toll roads," saying that the "exaction of money from highway travelers, who are prohibited from using highways unless they pay, is a 'toll.'" The opinion cites the case of *Matter of Application of Smith* (1917) 33 Cal. App. 161, 164, in which the court held that a city could not "exact tribute" from travelers on public roads. The conclusion was that a local authority could not "impose conditions on use of city streets over and above those imposed by the Vehicle Code." In *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal. App. 2d 342 (1960 the court struck down a local authority's attempt to require commercial vehicles to purchase and display an emblem, because the Vehicle Code already required a fee and a registration and no local authority could charge any additional fee or require any additional permit. Therefore it is not legally possible for the county to require any member of the public to obtain a user permit or pay a user fee for vehicular use of the Rubicon Trail.

Maintenance

The county has no maintenance obligation on any public road that has not been accepted into the county maintained road system by formal action of the board of supervisors pursuant to Streets & Highways Code §941(b). The Attorney General has concluded that the public use of roads alone does not confer upon a public entity any duty to maintain such roads absent a dedication and acceptance of the roads into the county maintained road system, which takes a formal action of the board of supervisors. 61 Ops. Cal. Atty. Gen. 466 (1978); 89 Ops. Cal. Atty. Gen. 148 (2006) (CSD roads). Government Code §831.3 says that no act of grading, maintenance, repair or reconstruction or replacement by a public entity on a road shall be deemed to give rise to any duty of the public entity to continue any of these activities on any road that is not a part of the county maintained road system. Thus the past maintenance efforts by the county on the Rubicon Trail do not obligate the county to continue to maintain it, except for that portion of Wentworth Springs Road that has been accepted into the county maintained road system.

Expenditure of funds

The county cannot expend public funds for private roads because this would violate the constitutional prohibition against making a gift of public funds. 80 Ops. Cal. Atty. Gen. 56 (1997). In general, the county may expend public funds for the construction and maintenance of public roads. In 80 Ops. Cal. Atty. Gen.56 (1997) the Attorney General approved the expenditure of public funds to maintain a road that crossed private property but had become a public road through implied dedication, similar to the RS 2477 right of way on Wentworth Springs Road. Some sources of funds have limitations on what they can be used for, and the county's most significant sources of road funding cannot be spent on a road that has not been accepted into the county maintained road system.

Formal County Actions in Regard To The Rubicon Trail

On August 3, 1887, the El Dorado County board of Supervisors passed a resolution which roughly described the route of the Wentworth Springs Road, and simply said it was "declared to be a public highway." This constituted public notice of the public right of way established on the federal and private land over which Wentworth Springs Road passed. As noted above, one of the many problems associated with R.S. 2477 is that no one knew for sure whether a right of way had been established, or where. This resolution solved that problem by publicly declaring that fact, and recording a rough and general description of the route of Wentworth Springs Road. The resolution of August 3, 1887 acted in a sense as a record of the acceptance of the federal government's offer to dedicate made in R.S. 2477, but it did not in any way purport to accept the Wentworth Springs Road into the county maintained road system. Streets & Highways Code §941(c) says that the "acceptance of any road . . . does not constitute the acceptance of the road into the road system in the absence of a resolution by the board of supervisors accepting the road into the county road system." The Attorney General has opined that a county may accept an offer of dedication of roads for public use, without accepting the roads into the county maintained road system and thereby becoming responsible for

maintenance. 61 Ops. Cal. Atty. Gen. 466 (1978). The resolution of 1887 did not purport to assert any kind of property interest or easement in the land over which the road passed, and has no legal significance beyond public notice.

On May 30, 1989, the El Dorado County Board of Supervisors adopted a resolution (number 142-89) which recites that "the status of the Rubicon Trail as a public road has come into question." The resolution also recites that "in the 1840's, what became later known as the Rubicon Trail, was used by travelers and early settlers in the Wentworth Springs-Rubicon Springs area of the Sierra," and references the 1887 declaration. The 1989 resolution declares that the Rubicon Trail had variants, "one in the vicinity of Gurley Creek known as the Francis Cow Camproute, and one commencing at Loon Lake, both variants joining the trail between Wentworth Springs and Rubicon Springs." The resolution declares that the Rubicon Trail "has been a public road since at least 1887 and has never been abandoned as a public road by the Board of Supervisors," and "reaffirms the status of the Rubicon Trail and its variants as a non-maintained public road in the county of El Dorado." Once again this resolution stands as public notice of the fact that the public obtained a right of way over the Rubicon Trail and its variant routes more than a century before, and has no legal significance beyond that.

In 2004, the El Dorado County Board of Supervisors adopted a resolution (number 220-2004) which declared a local state of emergency regarding unsanitary conditions in the Spider Lake-Little Sluice area. The resolution declared a local emergency under Government Code §8558(c) of the Emergency Services Act, which allows mutual aid to take place between El Dorado County and other jurisdictions. The resolution directed that "preventive measures" be taken to abate the pubic health hazard that evolved in the area from human waste. The Board adopted this resolution in reaction to a temporary order signed by the Forest Supervisor on July 15th which closed the same area for 120 days due to his perception of a public health hazard. The Forest Service order closed the federal land to public camping, and the county order closed the private land in the Little Sluice-Spider Lake area to the public for 120 days. The authority for this action is Health and Safety Code §101025 (erroneously cited in the resolution as §101470) which gives the board of supervisors the ability to "take measures as may be necessary to preserve and protect the public health in the unincorporated territory of the county." This declaration was made pursuant to the county's police power to regulate the use of private land within the county and to protect the public health, and did not in any way purport to regulate traffic or usage of the Rubicon Trail itself, because the county does not have authority to regulate the public's use of the public road. The resolution specifically noted that "such closure shall not effect the use of the Rubicon Trail as a thoroughfare." The emergency action was taken because of concerns over the amount of human waste that had been generated in a small area near the Trail. The concern dissipated in a short time and there has not been a sufficiently acute, localized public health problem since, because of steps the county and others have taken to educate and equip travelers concerning proper sanitary disposal methods.

Conclusion

The law described above makes it clear that the Rubicon Trail cannot be dealt with as if it were an ordinary road. The county does not own any land over which the road travels, and the only property interests the county has are easements over the Ellis Creek Intertie, a little over 1 mile. The ability of the county to regulate the use of the road is quite limited. The county can only take those actions that are specifically granted to it by state law, and that is not very much. In the view of the county, the above authorities demonstrate that the county cannot as a matter of federal and state law vacate the public right of way, or close the road, or gate it except for short periods on the segment from Airport Flat Campground to Wentworth Springs Campground and then for only three specific reasons. This legal situation has presented a challenge to the county for over 150 years in its efforts on the Rubicon Trail, and continues to present a challenge. Any action the Regional Board is considering taking in regard to the Rubicon Trail has to take into account the law affecting the Trail, and thus the Board shares those challenges with the county, as well as with the other interested parties which are affected by the Trail.

I would be happy to discuss any of these issues with you at any time.

Very Truly Yours,

LOUIS B. GREEN
County Counsel

By: _____
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